In the High Court of Judicature at Madras

Dated:05.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.216 OF 1997

Varanavasi Gounder ..Appellant/Respodnent/Plaintiff

v

E.S.Krishnaswami ..Respondent/appellant/Defendant

This second appeal is filed against the judgment and decree dated 28.11.1996 made in A.S.No.107 of 1996 on the file of the Court of Principal District Judge, periyar District at Erode reversing the decree and Judgment in O.S.No.791 of 1994 dated 24.6.1996 on the file of the Court of Principal District Munsif,Erode.

For Appellant : Mr.V.K.Nachimuthu
For Respondent : Mr.M.Sudhakar
(Amicus Curiae)

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.107 of 1996 on the file of the Court of Principal District Judge, Periyar District at Erode. The plaintifif, who got a decree before the trial Court in O.S.No.791 of 1994 on the file of the Court of Principal District Munsif, Erode, but in the appeal preferred by the defendant in A.S.No.107 of 1996, lost the same is before this Court in Second appeal.

2. The averments in the plaint which has been filed by the plaintiff for an order of permanent injunction in brief relevant for the purpose of deciding this appeal are as follows:
The suit properties are situated in Avalpoondurai Village. The plaintiff got the suit property under a compromise decree dated 16.7.1990. The plaintiff and his two sons K.V.Viswanathan and K.V.Shanmughasundaram got a property under a partition. The plaintiff is in possession and enjoyment of the suit property. The compromise was entered into between the parties in O.S.No.366 of 1990 under a decree dated 16.7.1990. The defendant's land is situate on the south of plaintiff's suit property. Taking advantage of the same, the defendant wants to trespass into the suit property. The defendant claims to hae a channel right over the suit

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property. But the defendant has no manner of right over the suit properpty. After the partition through the Court, the plaintiff is in possession and enjoyment of the suit property by paying land tax regularly. The defendant attempted to trespass into the suit property on 26.4.1994 and the plaintiff prevented the trespass with the help of his neighbours. The defendant may come at any time and trespass into the suit property. Hence the suit .

3. The defendant in his written statement would contend that he is not aware of the alleged compromise decree dated 16.7.1990. The defendant is not a party at the said suit in O.S.No.366 of 1990 on the file of the Court of Principal Subordinate Judge, Erode. The defendant owns an agricultural land on the south east of the suit propeprty and it measures about 5.55 acres in R.S.No.1179 of Aval Poondurai Village. The said land is being irrigated by LBP canal water. Eversince, the advent of the LBP canal, this respondent is irrigating his land through the LBP water. The LBP(Lower Bhavani Project) main canal is situated on the north of the plaintiff land; a channel branches off from the sluice situated on the north of the suit property. It runs from north to south for about 400 feet on the western boundary of the plaintiff's land in R.S.No.1183, then it enters into the land of the third party namely Thangamuthu and turns towards East. It runs about 300 feet in Thangamuthu's land and enteres the land of the defendant in R.S.No.1179. The breadth of the "Koppu" is about 2 feet excluding bunds. The location of the said LBP "Koppu" channel is marked as ABCD EF in the rough plan filed by this defendant. The defendant is taking water through the above said "ABCDEF" channel for nearly four decades. The defendant has perfected right by essment of prescription. Except, the above said channel, there is no other facility to take the LBP water and to irrigate the respondent's land in R.S.No.1179. The plaintiff has filed the suit with ulterior motive. The plaintiff sought permission to lay underground pipeline in respondent's land in R.S.No.1179 for taking odai pallam Water which runs east west on the south of the defendant's land to the plaintiff's land in R.S.No.1183. The defendant has refused to give permission. Aggrieved at it, the plaintiff started to give troubles to the respondent from taking LBP water through ABCD channel as shown in the above said plan. The defendant sent a petition to Revenue Officials. The revenue Officials inspected and found the existence of the field Boothi. That being so, all of a sudden the plaintiff has filed the above said suit for permanent injunction without mentioning the channel properly. This defendant has not attempted to trespass into suit property on 26.4.1964. Hence the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed two issues for trial. The plaintiff has examined himself as P.W.1 and the defendant has examined as D.W.1. Apart from D.W.1, on the side of the defendant, D.W.2 has also examined. The plaintiff has exhibited Exs A1 and A9 and on the side of the defendant Exs B1 to B17 were marked. A Commissioner was appointed for noting the physical features of the suit

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property and filed his report Ex C1 and plan Ex C2.

5. After going through the available evidence both oral and documentary, the learned trial Judge has come to a conclusion that the plaintiff is entitled to an order of injunction and accordingly decreed the suit without costs. Aggrieved by the findings of the learned trial Judge, the defendant has preferred an appeal in A.S.No.107 of 1996 on the file of the Court of Principal District Judge, Erode who after due deliberation on the rival contentions of both the parties has come to a conclusion that the plaintiff has not approached the Court with clean hands and that he is not entitled to an order of permanent injunction in respect of the suit property and accordingly allowed the appeal, thereby set aside the decree and Judgment of the trial Court and dismissed the suit without costs which necessitated the plaintiff to prefer this second appeal.

6. When the appeal was taken up for final hearing, there is no representation on behalf of the respondent. Hence Mr.M.Sudhakar, Advocate has been appointed as Amicus Curiae to defend the respondent.

7. The substantial questions of law involved in this appeal are

" 1. Whether the Judgment and decree of the lower appellate Court is vitiated in that the reliance placed by the lower appellate Court on Ex B12 for coming to the conclusion that the defendant was irrigating his lands through the channel that runs through the lands of the appellant especially when the authority who issued Ex B12 has no power under the Tamil Nadu Irrigation of Field Buddhis Act to issue Ex B12?

2. Whether the Judgment and decree of the lower appellate Court is correct in law to hold that the defendant has proved his right of taking water by way of easement by necessity, in the absence of any evidence adduced by the defendant that he was using the alleged channel for more than the statutory period?

3. Whether the Judgment and decree of the lower appellate Court is vitiated in that the lower appellate Court failed to consider ExA6 which would clearly go to show that the defendant had the right to take water only through some other sluice and not through the lands belonging to the appellant?

8. Heard Mr.V.K.Nachimuthu, learned counsel appearing for the appellant and Mr.M.Sudhakar(Amicus Curiae) learned counsel appearing for the respondent and considered their respective submissions.

9.The Points:

The suit is filed by the plaintiff for an order of permanent injunction. According to the plaintiff, the defendant has made an attempt to trespass into the suit property on 26.4.1994. The plaintiff would allege that the

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defendant claiming that he is having a channel right over the suit property has made an attempt to trespass into the suit property. Admittedly, the defendant's land is situated on the east of one Thangamuthu's land. The said Thangamuthu's land is situate on the south of the plaintiff's land.

10. The learned first appellate Judge has observed that the plaintiff has not approached the trial Court with clean hands . On the other hand, there is no avement in the plaint to the effect that the defendant is having a right to iririgate his land from the water of LBP channel which is situate on the west of the plaintiff'sland. To show that the defendant has also obtained permission from the Government to take water from the LBP channel which runs west of the defendant's land, the defendant has produced Ex B1.

11. The learned counsel appearing for the appellant would contend that there is no survey number mentioned in Ex B1 to show that it relates to the defendant's land and that the Government have permitted the defendant to take water from LBP channel to his land. Ex B1 is dated 19.1.1985. It is the definite case of the defendant in his written statement that he is irrigating his land measuring 5.55 acres in R.S.No.1179 of Avalpoondurai Village from the water flows through LBP canal. It is the definite case of the defendant, that eversince, the advent of the LBP canal the respondent is irrigating with LBP water, his land in R.S.No.1179. Ex B5 is an extract of Adgangal Register for fasli 1394 which shows that the defendant is in possession and enjoyment of R.S.No.1179 and he has raised paddy crop and the source of irrigation is through LBP channel. Ex B6 is also an extract of Adangal Register for fasli 1395 which also shows that the defendant has raised ginglee crop in R.S.No.1179 and the source of irrigation has been shown as canal water through LBP channel. Ex B7 is also an extract of Adangal Register for fasli 1396. Ex B8 is also an extract of Adangal Register for fasli 1398. Ex B9 is also an extract of Adangal Register for fasli 1400. Ex B10 is also an extract of Adangal Register for fasli 1401. Ex B11 is also an extract of Adangal Register for fasli 1402. Ex B12 is also an extract of Adangal Register for fasli 1403.

12. A perusal of Ex B12 will derive us to an unassailable conclusion that there is a water course available in re survey No.1179 . There is a land belonging to the defendant getting water from the LBP channel and that a complaint was preferred by the defendant E.S. Krishnaswami to the Reveue Officials that the plaintiff viz., Varanavasi Gounder had obstructed the defendant from taking water through his canal to his land in R.S.No.1179 and that the said complaint was preferred before the District Collector at Jamabandi and that an enquiry was conducted and it was found that the plaintiff has made an attempt to obstruct the water course through LBP channel through the canal provided by the defendant to his land in R.S.No.1179. So the contention of the learned counsel appearing for the appellant that the defendant has no right to take water from the LBP channel to his land in re survey No.1179 holds no water.

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13. Ex B3 was marked through D.W.1. He would depose that the defendant had obstructed the water course leading from LBP channel on the west of his land to his land in Resurvey No.1179 and that he had obstructed a portion of the water course which leads in LBP channel to the Survey No.1179 and also to other survey number properties and that only on his complaint to the Revenue Officials, the water course was restored on 22.10.1994. The same thing has happend on 11.8.1994 also and as per the order of the Tahsildar, the oblitereated portion in the canal to an extent of 2 meters was restored. The defendant has also produced Ex B16 sketch to show the water course leading from LBP main sluice to the defendant's land in R.S.No.1179 which runs through R.S.No.1183 belongs to the plaintiff. So the submission of the learned counsel appearing for the appellant that the defendant has no right to take water from LBP channel to his land in R.S.No.1179 has no leg to stand.

14. The learned first appellate Judge has meticulously gone thrugh the documentary evidence as well as the oral evidence has come to a correct conclusion that the plaintiff has not come to the Court with clean hands and allowed the appeal thereby dismissing the suit.Under such circumstances, I do not find any reason to interfere with the well considered findings of the first appellate Judge in A.S.No.107 of 1996 on the file of the Court of the Principal District Judge, Erode which is neither infirm nor illegal to warrant any interference from this Court. Points are answered accordingly.

12. In fine, the appeal is dismissed , confirming the decree and Judgment of the first appellate Court in A.S.No.107 of 1996 on the file of the Court of Principal District Judge, Erode, with costs through out. This Court records the valuable services rendered by the Amicus Curiae Mr.M.Sudhakar appointed to defend the respondent. His fee is fixed as Rs.3,000/-(Rupees Three thousand) only to be paid by the State Legal Aid Services Authority.

sg

Sd/
Asst. Registrar

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Sub Asst.Registrar

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To

1. The Principal District Judge,Erode.
2. The Principal District Munsif, Erode.
3. The Record Keeper, V.R. Section,
High Court, Chennai.

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Copy to

1. The Member secretary,
Tamil Nadu State Legal Services Authority,
High Court, Madras.

2. Mr. M. sudhakar, Advocate, High Court, Madras.
GG (co)
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